No. 93-1543

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

CHRISTINE MCKENNON,
Petitioner,
v.
THE NASHVILLE BANNER PUBLISHING COMPANY,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF THE WOMEN'S LEGAL DEFENSE FUND, EQUAL RIGHTS ADVOCATES, NATIONAL COUNCIL OF JEWISH WOMEN, NATIONAL COUNCIL OF NEGRO WOMEN, NATIONAL ORGANIZATION FOR WOMEN, NATIONAL WOMEN'S LAW CENTER, NOW LEGAL DEFENSE AND EDUCATION FUND, OLDER WOMEN'S LEAGUE, PEOPLE FOR THE AMERICAN WAY, WOMEN EMPLOYED, WOMEN'S LAW PROJECT, AND YWCA OF THE U.S.A. AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

TABLE OF AUTHORITIES—Continued

STATUTES AND RULES:

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INTEREST OF THE *AMICI CURIAE* [1]

Amici curiae are non-profit public interest advocacy organizations that work to ensure the development of legal principles that will advance the employment rights of women and other disadvantaged classes and result in

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[1] Pursuant to Rule 37.3 of the Rules of this Court, letters indicating the written consent of all parties to the filing of this brief are being lodged with the Court.

the sound administration of federal antidiscrimination laws. They litigate and educate the public to improve equal opportunity for women and other historically disadvantaged groups. Statements of Interest of individual *amici* are attached as an Appendix to this brief.[2]

SUMMARY OF ARGUMENT

Currently, an employer who has engaged in unlawful discrimination may, in some jurisdictions, obtain judgment as a matter of law without ever having to justify its discriminatory action before a judge or jury. The employer need only show that it would have made the same employment decision had it known of newly-discovered misconduct by the employee—regardless of the fact that this misconduct played no role in the decision.

The use of this "after-acquired evidence doctrine," as it has become known, has extended to a wide range of antidiscrimination statutes. In doing so, courts have, in essence, allowed employers to escape all liability for even proven discrimination.

The Age Discrimination in Employment Act, along with Title VII of the Civil Rights Act of 1964 and antidiscrimination law in general, has two underlying purposes: making victims of discrimination whole and deterring future discrimination. Application of the after-acquired evidence doctrine to bar relief completely for discrimination victims undermines both of these purposes.

This brief samples a range of cases that show how the after-acquired evidence doctrine has worked to insulate employers from answering serious allegations of discrimination, thus frustrating the purposes of federal antidiscrimination law.

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[2] *Amici* gratefully acknowledge the significant contributions of law clerk Dann Determan in the preparation of this brief.

ARGUMENT

THE AFTER-ACQUIRED EVIDENCE DOCTRINE HAS BEEN APPLIED TO UNDERMINE THE PURPOSES OF ANTIDISCRIMINATION LAW.

The question in this case is whether an employee who is discharged in violation of the ADEA is barred from obtaining any remedy if, solely as a result of the unlawful termination and the litigation challenging it, the employer discovers another basis for its employment decision.

The use of the "after-acquired evidence doctrine," as it has become known, has extended to other antidiscrimination statutes as well. *See Dotson v. U.S. Postal Serv.*, 977 F.2d 976 (6th Cir.), *cert. denied*, 113 S. Ct. 263 (1992) (Rehabilitation Act); *Reed v. AMAX Coal Co.*, 971 F.2d 1295 (7th Cir. 1992) (Title VII); *Washington v. Lake County, Ill.*, 969 F.2d 250 (7th Cir. 1992) (same). Several courts have applied the doctrine as a complete bar to remedy for a plaintiff alleging discriminatory employment decisions. *See Dotson v. U.S. Postal Serv.*, 977 F.2d 976 (6th Cir.), *cert. denied*, 113 S. Ct. 263 (1992); *Reed v. AMAX Coal Co.*, 971 F.2d 1295 (7th Cir. 1992); *Washington v. Lake County, Ill.*, 969 F.2d 250 (7th Cir. 1992); *Johnson v. Honeywell Info. Sys., Inc.*, 955 F.2d 409 (6th Cir. 1992); *Summers v. State Farm Mut. Auto. Ins. Co.*, 864 F.2d 700 (10th Cir. 1988). In doing so, these courts have, in essence, allowed an employer to escape all liability for even proven discrimination. The Eleventh Circuit, in rejecting this doctrine, observed that the after-acquired evidence doctrine allows "an employer [to] avoid all liability for a discharge based solely on unlawful motives by proving that it would have discharged the plaintiff absent any unlawful motives if it had possessed full knowledge of the circumstances existing at the time of the discharge." *Wallace v. Dunn Constr. Co.*, 968 F.2d 1174, 1178 (11th Cir. 1992).

An employer exploiting the after-acquired evidence doctrine need never justify its discriminatory employment

decision before a judge or jury. The employer need only show that it would have made the same employment decision had it known of the employee's newly-discovered misconduct—regardless of the fact that this misconduct played no role in the decision.[3] Indeed, as was the case with Christine McKennon, the employee's misconduct in many instances is not even discovered until preparation for trial on the discrimination claim. *See Dotson v. U.S. Postal Serv.*, 977 F.2d 976, 977 (6th Cir. 1992), *cert. denied*, 113 S. Ct. 263 (1992); *Reed v. AMAX Coal Co.*, 971 F.2d 1295 (7th Cir. 1992); *Washington v. Lake County, Ill.*, 969 F.2d 250, 252 (7th Cir. 1992); *Johnson v. Honeywell Info. Sys., Inc.*, 955 F.2d 409, 411 (6th Cir. 1992); *Summers v. State Farm Mut. Auto. Ins. Co.*, 864 F.2d 700, 703 (10th Cir. 1988); *Agbor v. Mountain Fuel Supply Co.*, 810 F. Supp. 1247, 1251 (D. Utah 1993).

The Eleventh Circuit recognized the perverse consequences of the application of the after-acquired evidence doctrine:

> [The doctrine] encourages an employer with a proclivity for unlawful motives to hire a woman—despite knowledge of a legitimate reason that would normally cause the employer not to employ her—to destroy any evidence of such knowledge, to pay her less on the basis of her gender, to sexually harass her until she protests, to discharge her, and to "discover" the legitimate motive during the ensuing litigation,

[3] Moreover, an employer's "proof" that it would have made the same employment decision had it known of the employee's misconduct has often consisted of self-serving affidavits by its own management. *See Dotson v. U.S. Postal Serv.*, 977 F.2d 976, 978 (6th Cir. 1992), *cert. denied*, 113 S. Ct. 263 (1992); *Washington v. Lake County, Ill.*, 969 F.2d 250, 256 (7th Cir. 1992). *But see Welch v. Liberty Mach. Works*, No. 93-2670, 1994 U.S. App. LEXIS 10028, at *9 (8th Cir. May 6, 1994) (forbidding the use of employer affidavits alone as proof that employee would not have been hired or would have been fired).

> thus escaping any liability for the unlawful treatment of the erstwhile employee.

Wallace, 968 F.2d at 1180-81.

The ADEA, along with Title VII and antidiscrimination law in general, has two underlying purposes: making victims of discrimination whole and deterring future discrimination. *See, e.g., Albermarle Paper Co. v. Moody*, 422 U.S. 405, 417-18 (1975). Employees rely on effective interpretation and enforcement of these statutes as critically important tools for obtaining relief from invidious discrimination in the workplace. As a nation we rely on the developing body of antidiscrimination law to provide guidance and to prevent the occurrence of employer discrimination. Application of the after-acquired evidence doctrine to bar relief completely for discrimination victims undermines both of these purposes.

The following cases show how this doctrine works to insulate employers from the consequences of their discriminatory conduct by depriving individual victims of their full rights under the law. These cases illustrate the manifest unfairness of the doctrine and how it is used to frustrate the purposes of federal antidiscrimination law. Though the plaintiffs in these cases come from different walks of life and have alleged different types of discrimination, they all share one common characteristic—each has had serious allegations of job discrimination dismissed through the use of the after-acquired evidence doctrine.

A. *Eileen Rich*

Eileen Rich worked as a pre-printing technician at Westland Printers from November 1989 until March 1992, when Westland laid her off, asserting that its decision was based on poor economic conditions. *Rich v. Westland Printers*, No. HAR 92-2475, 1993 U.S. Dist. LEXIS 8526, at *2 (D. Md. June 9, 1993). Ms. Rich believed that Westland's decision to lay her off was based on sex discrimination. *Id.* She filed a lawsuit alleging,

inter alia, sex discrimination in violation of Title VII, claiming that her immediate supervisor, J.R. Westland ("J.R."), sexually harassed her and treated her less favorably than male employees. (Pl.'s Compl. at 1-8.)

Included in Ms. Rich's complaint were allegations that: J.R. displayed pictures of naked women on the wall, along with a poster exclaiming, "Sexual Harassment WILL be Tolerated!"; J.R. denigrated women who asked him questions with responses like "What the hell do you want now?" and "Can't you leave me alone?" but answered similar questions by male employees in a non-abrasive manner; and that J.R. remained silent when male employees were late to work or finished work behind schedule, yet would castigate women who did the same. *Id.* at 3-5.

Ms. Rich also alleged that men were promoted to other, higher-paying departments within the company while women were not. For example, Westland hired a male from outside the company to fill a position in a new, computerized division of the company, despite Ms. Rich's request for the job and a company policy of promoting and training from within. *Id.* at 7.

Ms. Rich asserted that J.R. fired her because she complained to others about his treatment of female employees. *Id.* at 6-7. She alleged that even though Westland claimed that her termination was necessary because business was slow, almost everyone in her department was required to work overtime, double overtime, and weekends to keep up with production—*after* she was discharged. *Id.* at 7.

Ms. Rich's serious allegations of sex discrimination and harassment were never presented at trial because Westland successfully used the after-acquired evidence doctrine to prevail on a summary judgment motion.[4]

[4] On summary judgment,

> [t]he facts themselves, and the inferences to be drawn from the underlying facts, must be viewed in the light most favorable to plaintiff, as the party opposing the motion . . . . The non-moving party is in a favorable posture, being entitled "to have the credibility of his evidence as forecast assumed, his version of all that is in dispute accepted, all internal conflicts in it resolved favorably to him, the most favorable of possible alternative inferences from it drawn in his behalf; and finally, to be given the benefit of all favorable legal theories invoked by the evidence as considered."

Ross v. Communications Satellite Corp., 759 F.2d 355, 364 (4th Cir. 1985) (citations omitted).

This principle applies equally to the cases discussed *infra* that were decided on summary judgment.

Westland discovered during preparation for trial that Ms. Rich had indicated on her original employment application that she had an associate's degree in graphic communication, when in truth she did not. *Westland*, 1993 U.S. Dist. LEXIS 8526, at *10-11. The district court awarded summary judgment to the defendant on the basis of this after-acquired evidence. *Id.* at 18.

The district court determined that it need not consider the merits of Ms. Rich's discrimination claim because she *could have been* terminated for resume fraud. *Id.* at 11. Although Ms. Rich asserted—and Westland did not dispute—that an associate's degree was not necessary for the lithographic position that she had successfully performed for over two years, the court relied on Westland's affidavits that an employee who misrepresented facts in his or her employment application would have been terminated immediately. *Id.* at 17-18. Despite her serious allegations of sex discrimination and harassment, Eileen Rich's claims were never heard or considered due to the application of the after-acquired evidence doctrine.

B. *Dorothea O'Driscoll*

Dorothea O'Driscoll worked at Hercules, Inc. from January 1980 until she was terminated in April 1986. *O'Driscoll v. Hercules, Inc.*, 745 F. Supp. 656, 657 (D. Utah 1990). After her termination, Ms. O'Driscoll

brought suit against Hercules, alleging, *inter alia*, age discrimination in violation of the ADEA.

Ms. O'Driscoll never got the opportunity to present her charge of discrimination before a judge or jury, however, because the trial court applied the after-acquired evidence doctrine in awarding summary judgment to Hercules. *Id.* at 661.

During preparation for trial, Hercules learned for the first time that Ms. O'Driscoll misrepresented her age, the ages of her children, the year of her high school graduation, and the fact that she had never previously applied to work for defendant.[5] *Id.* at 657, 659.

Hercules was never required to defend against Ms. O'Driscoll's discrimination claim on the merits. Indeed, the court fully recognized that the motion for summary judgment had "nothing to do with the reasons for [her] termination." *Id.* at 657. Instead, Ms. O'Driscoll's allegations of age discrimination remained unheard—because six years earlier, she had led Hercules to believe that she was younger than she really was.

C. *Patricia Milligan-Jensen*

Patricia Milligan-Jensen was hired as a Public Security Officer for Michigan Technological University ("MTU" or "the University") in November 1987. *Milligan-Jensen v. Michigan Technological Univ.*, 975 F.2d 302, 303 (6th Cir. 1992), *cert. granted*, 113 S. Ct. 2991, *and cert. dismissed*, 114 S. Ct. 22 (1993). She was MTU's only female officer. *Id.* MTU terminated her three months later, purportedly due to an unsatisfactory rating during the initial probationary period. *Id.* Ms. Milligan-Jensen brought a Title VII suit, alleging that she was terminated

[5] Ms. O'Driscoll acknowledged that she had misrepresented her age on her application but maintained that she had done so because she feared she would have been discriminated against had she revealed her correct age. *O'Driscoll*, 745 F. Supp. at 657.

on the basis of her sex and in retaliation for an EEOC complaint she filed during her employment. *Id.* at 302.

The district court held that the University treated Ms. Milligan-Jensen substantially differently than male officers. *Id.* at 303. For example, after the first month on the job, Ms. Milligan-Jensen was cited for a uniform code violation. *Id.* Her 30-day evaluation contained ratings in the "marginal" range, with a special reference made to her uniform violation. *Id.* A male officer who had received the same type of citation did not receive such ratings, nor did his evaluation refer to this violation. *Id.*

The court also found that Ms. Milligan-Jensen was reassigned badge numbers and given Badge 37 because it had previously been assigned to women. *Id.* Furthermore, the court found that she was assigned to the "bump shift," which was essentially a meter maid position. *Id.* The male officers, on the other hand, were assigned "swing shifts" during which they patrolled the campus and responded to calls. *Id.*

When Ms. Milligan-Jensen met with her supervisor to request reassignment to a spot left vacant by another officer, her supervisor responded by saying, "You're the woman, aren't you?" and "You've got the lady's job. Don't you like it?" *Id.* Her supervisor documented these comments in her file, along with other criticisms of her work. *Id.* Ms. Milligan-Jensen called the EEOC regarding this incident (a call of which she alleges her supervisor was aware). *Id.* Two weeks later she filed complaints with the EEOC and the University. *Id.* Twelve days later she was fired, purportedly because of her unsatisfactory probationary period. *Id.*

During discovery in her Title VII lawsuit, defendants learned for the first time that Ms. Milligan-Jensen had been convicted five years before for driving under the influence of alcohol. *Id.* (*citing Milligan-Jensen v. Michigan Technological Univ.*, 767 F. Supp. 1403, 1410 (W.D.

Mich. 1991)). Although the district court held that Ms. Milligan-Jensen's omission on her employment application was a material falsification, it did not admit this after-acquired evidence on the issue of liability.

Instead, the district court judge found that there was direct evidence of sex discrimination and held that the University had failed to prove that it would have terminated Ms. Milligan-Jensen for non-discriminatory reasons. *Milligan-Jensen*, 975 F.2d at 303. The court then relied on the evidence of Ms. Milligan-Jensen's omission on her application to reduce by half the damages due her because of her discriminatory termination. *Id.* at 304.

On appeal, however, the Court of Appeals for the Sixth Circuit reversed. The court held that despite the district court's finding of discrimination, Ms. Milligan-Jensen suffered no legal injury because MTU would have fired her had it known of her falsification. *Id.* at 304-05.

Thus, even though a district court had concluded that Ms. Milligan-Jensen had been the victim of sex discrimination, the Sixth Circuit applied the after-acquired evidence doctrine to deny her any recovery and to insulate MTU from the consequences of its proven wrongdoing.

D. *Heather Van Deursen*

Heather Van Deursen worked as a consumer marketing representative for the U.S. Tobacco Sales & Marketing Co.'s ("USTS & M") smokeless tobacco company from September 1989 until her termination in January 1992. *Van Deursen v. U.S. Tobacco Sales & Mktg. Co., Inc.*, 839 F. Supp. 760, 761 (D. Colo. 1993). Ms. Van Deursen then filed a lawsuit alleging that during her employment, USTS & M management discriminated against her on the basis of sex in violation of Title VII. *Id.* Ms. Van Deursen alleged that her immediate supervisor, Stephen Danielski, harassed her and denied her the same rights, privileges and respect he afforded his male subordinates. (Pl's Compl. at 1-2.)

Soon after she was hired, Ms. Van Deursen claimed, Danielski informed her that two other women had previously worked for him, that neither had proved satisfactory, and that if she did not work out, he would never hire another woman. *Id.* at 1. Further, Ms. Van Deursen alleged that during a business meeting, Danielski told her that previous women employees had tried to seduce him for employment preferences; he also tried to discuss his sexual fantasies with her. *Id.* at 2. Ms. Van Deursen claimed that on another occasion Danielski harassed her about her personal life. *Id.* According to Ms. Van Deursen, he demanded to know with whom she was sleeping, requested the addresses and phone numbers of the places she was sleeping, and threatened to hire someone to obtain this personal information. *Id.* Ms. Van Deursen alleged that Danielski informed her that her failure to give him these personal details about her sexual activities would appear in her upcoming review as a "communication problem." *Id.*

Ms. Van Deursen claimed that at another company meeting in 1991, Danielski and two other managers confronted her, called her a "feminist," and warned her that she could get in a lot of trouble for raising harassment complaints. *Id.*

Ms. Van Deursen complained to management in writing about Danielski's sexual harassment, but she continued to suffer harassment and retaliation by him. In January 1992, USTS & M fired her, claiming that she misappropriated company funds and failed to adhere to company policy. *Id.*

In preparation for trial on the Title VII claim, USTS & M discovered what it claimed to be a discrepancy on her original employment application regarding her reason for leaving her previous employer, and used this "evidence" to defend against her sex discrimination charge. *Van Deursen*, 839 F. Supp. at 761. USTS & M disputed Ms. Van Deursen's statement on her application that she

left her former employer because she refused to take a pay cut. *Id.* at 761-62. Rather, USTS & M contended that Ms. Van Deursen's previous employer terminated her because of a discrepancy in her cash drawer. *Id.* at 761.

Ms. Van Deursen maintained that "pay cut" was an accurate characterization of her reason for leaving and disputed the existence of any cash discrepancy. *Id.* at 762-63.

Notwithstanding that the parties disputed the underlying facts surrounding her statement on the employment application, the court relied on the after-acquired evidence doctrine to award USTS & M summary judgment. *Id.* at 763. The court, relying on the affidavits of USTS & M management, held that Ms. Van Deursen's alleged misstatement on her application was material to its decision to hire her or, in the alternative, that USTS & M would have fired her had they been aware of the details of her departure from her previous employment. *Id.* As a result, Heather Van Deursen's serious allegations of sexual harassment, sex discrimination and retaliation were never heard. Instead, the court focused on alleged events surrounding a *previous* job—events that were unknown to the employer at the time it discharged Ms. Van Deursen and so in no way motivated its decision—to deny Ms. Van Deursen relief.

E. *Rosie Bonger*

Rosie Bonger worked at American Water Works Association (AWWA) from September 1988 until her termination in March 1990. *Bonger v. American Water Works Ass'n*, 789 F. Supp. 1102, 1104 (D. Colo. 1992). She claimed that AWWA's decision to fire her was the result of sex and race discrimination and retaliation in violation of Title VII. *Id.*

Ms. Bonger was hired into a newly-created Director of Human Resources position and was responsible, among

other things, for investigating discrimination complaints. *Id.* One of her initial assignments was to report on the compensation practices of AWWA. (Pl.'s 1st Am. Compl. at 2.) She developed a set of proposed salary ranges which she presented in a meeting of the Finance Committee in October 1988. *Id.* At this meeting, Ms. Bonger alleged that the Treasurer of AWWA verbally attacked her, telling her that her figures were inaccurate despite their earlier approval by her immediate supervisor, John Mannion. *Id.*

Ms. Bonger completed a report summarizing the compensation and hiring practices at AWWA in January 1989. *Id.* at 3. She concluded that AWWA placed minorities and women in lower-paying positions and that those few who were placed in management positions were paid considerably less than similarly situated white males. (Pl.'s Br. in Opp'n to Def.'s Mot. for Summ. J. at 6.) In her report, Ms. Bonger suggested several strategies by which AWWA could eliminate the discriminatory inequities. *Id.*

Ms. Bonger alleged that AWWA management then responded by engaging in "a course of conduct to retaliate against her, interfere with the performance of her job, isolate her and subject her to a hostile work environment based on her ethnicity and gender." *Id.* at 6-7.

Moreover, according to Ms. Bonger, Mannion subverted her efforts to respond to a number of employee allegations of discrimination by AWWA management. (Pl.'s 1st Am. Compl. at 3-5.) Ms. Bonger alleges that Mannion tried to engage her help in covering up these incidents by fabricating documents or whiting out evidence of overt discriminatory stereotyping. (Pl.'s Br. in Opp'n to Def.'s Mot. for Summ. J. at 7.) On another occasion, Ms. Bonger alleged that Deputy Executive Director Jack Hoffbuhr circumvented her authority and personally investigated an EEO complaint lodged against another manager. *Id.* at 8.

In February 1990, Ms. Bonger wrote Steve Merker, counsel for AWWA, for advice regarding the lack of management response to EEO complaints. *Id.* at 8-9. Merker suggested that Ms. Bonger take a paid leave of absence during his investigation because "he felt it important for her to remove herself from the workplace in order for him to conduct interviews of relevant individuals." *Id.* at 9. Ms. Bonger said that she complied only after Merker assured her that the leave of absence would not adversely affect her employment at AWWA. *Id.* On March 9, 1990, while Ms. Bonger was still on leave of absence, AWWA sent her a letter of termination. *Bonger*, 789 F. Supp. at 1104.

Ms. Bonger brought suit, asserting claims for sex and race discrimination and retaliation under Title VII. *Id.* She never received an opportunity to argue the merits of her claims, however, because AWWA was awarded summary judgment under the after-acquired evidence doctrine. *Id.* at 1107. During discovery, AWWA learned for the first time that Ms. Bonger had misrepresented her educational history on her employment application. *Id.* at 1104. She claimed to have earned a degree in business administration, but, in fact, had not. *Id.* at 1105. AWWA used this evidence to avoid substantive consideration of Ms. Bonger's Title VII claim. Relying on AWWA's "undoubtedly self serving" affidavit, the trial judge determined that a grant of relief to the plaintiff was precluded because of the after-acquired evidence doctrine. *Id.* at 1107.

F. *Elizabeth Miller*

Beneficial Management Corp. ("Beneficial") hired Elizabeth Miller as an Associate Counsel in its legal department in October 1980 when she was 62 years old. *Miller v. Beneficial Management Corp.*, 977 F.2d 834 (3rd Cir. 1992).[6] After she resigned in October 1989,

[6] The procedural history of this case is as follows: Defendant was initially granted summary judgment on other grounds, but the Third Circuit reversed and remanded. *Miller v. Beneficial Management Corp.*, 977 F.2d 834, 847 (3rd Cir. 1992) ("Miller I"). Upon remand, a magistrate then denied defendant's motion to amend its answer to include the after-acquired evidence defense. However, the District Court for the District of New Jersey reversed the magistrate and permitted the amended answer. *See Miller v. Beneficial Management Corp.*, No. 89-3089, 1993 U.S. Dist. LEXIS 19168, at *55 (D.N.J. Sept. 20, 1993). Ms. Miller's allegations of discrimination were discussed by the Third Circuit in Miller I.

Ms. Miller filed a complaint alleging that Beneficial's discriminatory promotion practices amounted to constructive discharge under the ADEA and Title VII. *Id.* at 841.

In 1984, Beneficial transferred Ms. Miller to the government relations department, where she assumed the job responsibilities previously held by both the Vice President of Government Relations and Senior Vice President of Government Relations. *Id.* at 836. Although Ms. Miller received a salary increase with her transfer, she was paid less than both of the attorneys she replaced. *Id.* at 836-37.

When Ms. Miller was promoted in 1985 to Assistant Vice President, her salary was still below that of both attorneys whom she replaced. *Id.* at 837. Despite receiving additional responsibilities, praise, and positive recommendations from her immediate supervisor, Ms. Miller was denied promotion to Vice President in 1986 and again in 1987. *Id.* at 837-38.

In 1988, after successfully overseeing the government relations department during her supervisor's eleven-week leave of absence, Ms. Miller again requested a promotion to Vice President. *Id.* at 838. Her supervisor denied the promotion, allegedly stating that "[her] best bet [was] to leave and sue on age discrimination and to go work for the government, which could not discriminate on the basis of age." *Id.* Ms. Miller's supervisor later told her that

she would never get the promotion to Vice President. *Id.* at 839.

Ms. Miller took a leave of absence the following month, and drafted a letter alleging unethical and discriminatory practices at Beneficial. *Id.* at 839-40. As a result of the letter, Beneficial undertook an internal investigation of Ms. Miller's employment history. *Id.* at 840.

Ms. Miller alleged that her supervisor stripped her of most of her duties upon her return to work, and in October, transferred her back to the legal department, foreclosing the possibility of future promotions. Ms. Miller then resigned and filed an ADEA suit. *Id.*

Beneficial moved for summary judgment on the basis of the after-acquired evidence defense. In preparation for trial, Beneficial for the first time discovered that Ms. Miller had misrepresented her date of birth on her employment application by three years. *Miller v. Beneficial Management Corp.*, No. 89-3089, 1993 U.S. Dist. LEXIS 19168, at *9 (D.N.J. Sept. 20, 1993). She claimed to have been born in 1931, when she was actually born in 1928. *Id.* In addition, Beneficial alleged that Ms. Miller had removed confidential documents without authorization for use in her lawsuit. *Id.* at 10. In support of its motion for summary judgment, Beneficial asserted that Ms. Miller never would have been hired had it known of her misrepresentations, or, in the alternative, that she would have been fired upon discovery of such misconduct. *Miller v. Beneficial Management Corp.*, No. 89-3089 letter op. at 7 (D.N.J. June 21, 1994).

Ms. Miller has not yet been able to present her case on the merits. Although the district court denied Beneficial's motion for summary judgment, the court validated the after-acquired evidence doctrine and remanded the case to the magistrate for a determination of whether Beneficial can prove that it would have fired Ms. Miller upon learning of her misconduct. *Id.* at 85.

G. *Marie Russell*

Microdyne, a manufacturer of computer products, hired Marie Russell in October 1990. *Russell v. Microdyne Corp.*, 830 F. Supp. 305, 306-07 (E.D. Va. 1993). She was terminated in July 1993. (Appellant's Br. for Appeal at 4.) She brought suit against Microdyne, alleging sex discrimination, sexual harassment, and retaliation in violation of Title VII. *Russell*, 830 F. Supp. at 306.

In her lawsuit, Ms. Russell alleged that Microdyne Senior Vice President Ralph Mason and others sexually harassed and otherwise discriminated against her. (Appellant's Br. for Appeal at 7-11.) Ms. Russell maintained that Mason refused to promote her solely because of her gender, despite her superior qualifications and recommendations from her division supervisor. *Id.* at 7.

Ms. Russell asserted that Mason repeatedly made sexist comments and remarks to women at Microdyne. Ms. Russell alleged, for example, that Mason referred to her as a "long-legged beauty;" he told her that when another female employee walked by "the earth stops moving;" he commented on whether women employees passed what he called "the wall test"—if a woman walked into a wall, whether her chest would hit first; he on one occasion told Ms. Russell that she looked sexy, and that "You must be looking for something or your husband must be away"; and he asked Ms. Russell whether another woman should be hired "because of her great legs." *Id.* at 7-8.

Ms. Russell alleged that she also was the target of unwanted sexual remarks from other Microdyne officials. She asserted that Richard Weavil, another Vice President, referred to her as "Wendy" because she reminded him of an old girlfriend who "really did something" for him. *Id.* at 8. Ms. Russell alleged that at a company party that she attended alone, Weavil said, "If I knew your husband wasn't coming, I would have left my wife at home." *Id.*

Ms. Russell further claimed that the Controller, Marshall Ellison, upon meeting with her to discuss a bonus, suggestively asked "What will you give me?" *Id.* She

alleges that Ellison also used a plastic hand to make crude gestures and to "touch" her on her head and back. *Id.* In addition, Ms. Russell says that Microdyne's President, Philip Cunningham, frequently referred to her as "sweetheart" or "baby," and on one occasion kissed her on the cheek. *Id.* at 8-9.

In February 1991, Ms. Russell complained to Microdyne's Manager of Human Resources. *Id.* at 9. Ms. Russell alleged that her complaint, instead of alleviating the discrimination, made it worse. *Id.* She claimed that Mason confronted her about her complaint, and that other men present taunted her such that she left the room in tears. *Id.*

In July 1991, Ms. Russell alleged that Mason called her into his office and sexually propositioned her. *Id.* Ms. Russell refused. *Id.* Shortly thereafter, she took a 14-day business trip. *Id.* Upon her return, Mason told her that he was reorganizing her division and that she would no longer have supervisory authority over a three-person staff. *Id.*

Ms. Russell received only a moderate salary increase in 1991, as compared to a number of similarly situated men in the company. *Id.* at 10. Ms. Russell alleged that her supervisor told her in early 1992 that he could not get a raise for her because Cunningham (Microdyne's president) believed that she made too much money for a woman. *Id.*

In her complaint Ms. Russell alleged sexual harassment, sexual discrimination and retaliation. *Russell*, 830 F. Supp. at 306. Microdyne sought summary judgment based on Ms. Russell's alleged misconduct, discovered after initiation of the lawsuit. *Id.* at 307. Microdyne argued that Ms. Russell had represented on her employment application that she worked full-time for another company, but that Microdyne had learned during discovery that she had worked only part-time. *Id.* The district court awarded Microdyne summary judgment on the basis of Microdyne's contention that had it been aware of this misrepresentation, Ms. Russell would never have been

hired, or, in the alternative, that upon discovery of the misrepresentation, she would have been fired. *Id.*

Marie Russell's case is currently on appeal in the United States Court of Appeals for the Fourth Circuit. Nos. 93-1895, 93-2078. A court has yet to rule on the merits of her underlying claims of sex discrimination, harassment and retaliation—solely because she told her employer that she had been employed full-time when she may have actually only worked part-time.

CONCLUSION

As these cases show, the after-acquired evidence doctrine too often works to insulate employers completely from answering for their discriminatory conduct. Under this doctrine, discrimination victims are barred from all recovery if their employers discover some unrelated past misconduct in preparing for trial on the discrimination claims. Indeed, this doctrine may well deter many victims of job discrimination from bringing their claims by the prospect of their employers scouring their background for evidence of misconduct. In this manner, the after-acquired evidence doctrine undermines the purposes of federal antidiscrimination law.

For the foregoing reasons, the Judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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APPENDIX

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The *Women's Legal Defense Fund* (WLDF) is a national advocacy organization that was founded in 1971 to advance the rights of women in the areas of work and family. WLDF works to challenge gender discrimination in the workplace through litigation of significant sex discrimination cases, public education, and advocacy for improvements in the equal employment opportunity laws and their interpretation before Congress and the federal agencies charged with their enforcement. Throughout this work, WLDF has placed special emphasis on equal employment opportunity for women of color, who often face job discrimination based on both race and gender. WLDF's participation as *amicus* in cases before this Court includes *Harris v. Forklift Systems, Inc.*, 114 S.Ct. 367 (1993), *J.E.B. v. Alabama ex rel. T.B.*, 114 S.Ct. 1419 (1994), *UAW v. Johnson Controls*, 499 U.S. 187 (1991), *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), *Johnson v. Transportation Agency of Santa Clara County*, 480 U.S. 616 (1987), *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986) and *Newport News Shipbuilding and Dry Dock Co. v. EEOC*, 462 U.S. 669 (1983).

Equal Rights Advocates, Inc. (ERA) is a San Francisco-based public interest legal and educational corporation dedicated to working through the legal system to secure equality for women. ERA has a long history of interest, activism, and advocacy in all areas of the law which affect equality between the sexes. Since its inception over 20 years ago, ERA has specialized in litigating employment discrimination cases. Allowing employers to excuse their discriminatory conduct by information discovered after that conduct would not only sanction the conduct, but would open up every victim of discrimination to intrusive and harassing investigations regarding all aspects of their lives.

The *National Council of Jewish Women, Inc.* (NCJW) is a volunteer organization, inspired by Jewish values,

that works through a program of research, education, advocacy and community service to improve the quality of life for women, children and families and strives to ensure individual rights and freedoms for all. Founded in 1893, NCJW has 100,000 members in over 500 communities around the country. Based on NCJW's National Resolutions that include working for "employment policies which safeguard the dignity, rights, benefits, health and safety of all workers," we join this brief.

The *National Council of Negro Women, Inc.* (NCNW), established in 1935, is a voluntary non-profit membership organization committed to the advancement of educational, social and economic opportunities for African American women. Through our thirty-four National African American Women's affiliate organizations and 250 community-based sections in forty-two states, NCNW has an outreach to four million women. NCNW supports the position taken in this *amici curiae* brief, which argues that employers who allegedly illegally discriminate against an employee may not be absolved through the introduction of evidence against the plaintiff acquired after alleged discrimination occurred. As African American women, issues of discrimination and the affirmation of equal employment opportunity are our utmost critical concern.

The *National Organization for Women, Inc.* (NOW) is the largest feminist organization in the United States, with a membership of over 225,000 women and men in more than 750 chapters throughout the country. Since its founding in 1966, a major goal of NOW has been the eradication of sex discrimination in employment, and the elimination of barriers that deny women economic opportunities and the ability to become economically self-sufficient. NOW believes that economic equality in the paid workforce is fundamental to women's ability to achieve equality in other aspects of society. In furthering its commitment to that goal, NOW has participated in

numerous cases and commented on proposed legislation and regulations to secure full enforcement of laws prohibiting employment discrimination against women.

The *National Women's Law Center* (Center) is a non-profit legal advocacy organization dedicated to the advancement and protection of women's rights and the corresponding elimination of sex discrimination from all facets of American life. In this connection, the Center has a particular interest in the vigorous enforcement of the nation's civil rights laws. Since 1972, the Center has actively participated in litigation to secure the rights of women and has participated in major Supreme Court cases addressing women's rights to equal protection under the law.

N.O.W. Legal Defense and Education Fund ("NOW LDEF") is a leading national non-profit civil rights organization that performs a broad range of legal and educational services in support of women's rights. NOW LDEF was founded in 1979 by leaders of the National Organization for Women. A major goal of NOW LDEF's is the elimination of barriers that deny women economic opportunities, such as employment discrimination. In furtherance of that goal, NOW LDEF litigates cases to secure full enforcement of laws prohibiting such discrimination, including *Robinson v. Jacksonville Shipyards, Inc.*, 760 F. Supp. 1486 (M.D. Fla. 1991), *appeal pending*, (11th Cir. argued Dec. 2, 1992).

The *Older Women's League* is a non-profit membership organization whose primary mission is to advance the status of midlife and older women. Although midlife and older women represent the fastest-growing segment of the workforce, they continue to be underpaid and face the combined obstacles of age and sex discrimination. Because of this the Older Women's League has a significant interest in the disposition of *McKennon v. Nashville Banner Publishing Co.*

People for the American Way is a nonpartisan, education-oriented citizens' organization established to promote

and protect civil and constitutional rights. People For has joined this brief because of its concern about the harmful effects of the after-acquired evidence rule on preventing and combatting discrimination in the workplace, as well as its concern that some version of the rule could improperly be applied in censorship and other First Amendment litigation.

Women Employed is a national organization of working women, based in Chicago, with a membership of 2000. Since 1973, the organization has assisted thousands of working women with problems of sex discrimination. Women Employed works to empower women to improve their economic status and to remove barriers to economic equity through advocacy, direct service and public education.

The *Women's Law Project* (WLP) is a non-profit, feminist legal advocacy organization located in Philadelphia. Founded in 1974, WLP works to abolish discrimination and injustice and to advance the legal and economic status of women and their families through litigation, public education, and individual counseling. During the past twenty years, WLP's activities have included extensive work in the area of sex discrimination in employment. WLP has a strong interest in the eradication of sex discrimination from the workplace and the availability of strong and effective legal remedies for sex discrimination and other forms of illegal discrimination. WLP believes that the decision below will deter victims of job discrimination from seeking redress.

The *YWCA of the U.S.A.* is the oldest women's membership organization in the nation. Founded in 1858, it currently serves over two million girls, women and their families through 400 YWCAs in 4,000 locations across the country. Strengthened by diversity, the Association draws together members who strive to create opportunities for women's growth, leadership and power in order to attain a common vision: peace, justice, freedom and

dignity for all people. We advocate for public policies that ensure freedom from discrimination and oppression and promote equity in employment and the elimination of discriminatory treatment in the workplace. Therefore, the YWCA of the U.S.A. supports the position taken in this *amici curiae* brief.